IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.
APPEAL NO.290 OF 1999
IN
WRIT PETITION NO.216 OF 1997

Lal Bavta Hotel Aur Bakery Mazdoor
Union, a trade union incorporated
under the Trade Unions Act, 1926,
with its office at Ence Barracks,
Barrack E, Room No.6, Mahapalika
Marg, Azad Maidan,
Mumbai 400 001. ..Appellant.

Vs.

1. Ritz Private Limited
a company incorporated under the
Companies Act, 1813, with its
Hotel establishment known as
Ritz Hotel situated at 5,
Jamshedji Tata Road,
Mumbai 400 020.

2. P.S. Ghose,
Hon'ble Member,
Industrial Court of Maharashtra
at Mumbai, with his office at
Arun Chambers, 7th floor, Tardeo,
Mumbai 400 034. ..Respondents.

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Shri P.O. Verghese i/b K. Balkrishnan for the Appellant.
Shri C.U. Singh, Senior Advocate with Shri Navraj Jalota with Shri Sanjay Udeshi i/b Sanjay Udeshi & Co. for Respondent No.1.

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CORAM: **R. M. S. KHANDEPARKAR, &**
DR. D.Y. CHANDRACHUD, JJ.

15th February, 2007.

ORAL JUDGMENT (Per DR.D.Y. CHANDRACHUD, J.) :

1. The First Respondent before the Court conducts a hotel known as Ritz Hotel at Jamshedji Tata Road, Mumbai. Some time in 1976 the management of the hotel introduced South Indian specialities as part of the menu of food in some of the restaurants at the hotel and for room service. A South Indian Kitchen was opened. The workman whose services formed the subject matter of the dispute was appointed on probation as a South Indian cook in August 1976 and was confirmed with effect from 1st January, 1977. Subsequently, the management of the hotel took a decision to close down the South Indian Kitchen claiming that upon an assessment of viability the South Indian Kitchen had been found to be the least profitable of the kitchen department. A notice was issued to the appropriate government on 16th September, 1991 under Section 25-FFA of the Industrial Disputes Act, 1947 indicating an intention of permanently closing down the South Indian Kitchen with effect from 16th November, 1991. The South Indian Kitchen was closed in pursuance of the notice and a letter of termination was addressed to the workman on 16th November, 1991 by which he was offered closure compensation in accordance with the provisions of Section 25-FFF as well as one month's notice pay and other legal dues including gratuity, earned salary and

leave salary. The workman was instructed to collect the said payment from the head office. A complaint of unfair labour practices was instituted by the union, on behalf of the workman under items 4(a) and 4(f) of Schedule II and under item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. By an order dated 29th November, 1996 the Industrial Court issued a declaration that the management had committed unfair labour practices under item 4(a) of Schedule II and under item 9 of Schedule IV and granted to the workman full backwages from 16th November, 1991 together with retrenchment compensation and interest at the rate of 12% per annum on the backwages. However, the claim for reinstatement was declined inasmuch as the Industrial Court held that from the evidence it had emerged that the South Indian Kitchen had been closed at the time when the complaint was instituted.

2. The management thereupon instituted proceedings under Article 226 of the Constitution which culminated in the order of a Learned Single Judge dated 14th January, 1999 which is questioned in these proceedings. The Learned Single Judge held

that Chapter VB of the Industrial Disputes Act, 1947 was not attracted to the circumstances of the case. The order of the Industrial Court was accordingly quashed and set aside.

3. At the hearing of the Appeal three matters have been placed in issue before the Court. First and foremost it has been urged that the provisions of Chapter VB of the Industrial Disputes Act, 1947 are attracted and that consequently the Learned Single Judge was in error in interfering with the order of the Industrial Court. Secondly, it was urged that in any event the provisions of Section 25-F would be applicable and the termination of the services of the workman must be regarded as illegal and void for non-compliance of those provisions. Thirdly, it was urged that an unfair labour practice with reference to items 4(a) and 4(f) of the IInd Schedule to the Industrial Disputes Act, 1947 stands established. These three submissions will now be taken up seriatim.

4. The applicability of Chapter VB of the Industrial Disputes Act, 1947 is governed by Section 25-K. Sub section (1) of Section 25-K provides that the Chapter shall apply to an industrial

establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than hundred workmen were employed on an average per working day for the preceding twelve months. The expression "industrial establishment" is for the purposes of the Chapter defined by clause (a) of Section 25-L as follows :

> "25L(a) "industrial establishment" means-
>
> (i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948)
>
> (ii) a mine as defined in clause (j) of sub-section (l) of section 2 of the Mines Act, 1952 (35 of 1952); or
>
> (iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);"

5. In the present case the question before the Court is whether the establishment of the First Respondent is a factory as defined in clause (m) of Section 2 of the Factories Act, 1948. If the establishment is a factory it would constitute an industrial establishment within the meaning of clause (a) of Section 25-L. The expression "factory" is defined in Section 2(m) of the Factories Act, 1948 thus :

> "(m) "factory" means any premises including the precincts thereof-
>
> (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
>
> (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on, -
>
> but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), or a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place."

6. The definition of the expression "factory" specifically provides that it shall not include a hotel, restaurant or eating place. The submission of counsel appearing for the Appellant is that sub clause (i) of clause (m) is attracted since more than ten workers have been working in the precincts of the establishment and a manufacturing process within the meaning of Section 2(k) is carried out. This submission would not advance the case of the Appellant any further for the simple reason that the statutory definition of the expression "factory" provides firstly what the definition means and

secondly what it does not include. Once a hotel, restaurant or eating place is deemed by the statute as not to be included within the definition of the expression “factory”, such an establishment shall stand excluded from the definition. In these circumstances, the Learned Single Judge was not in error in coming to the conclusion that the establishment of Ritz Hotel being a hotel would not fall for classification as a factory under Section 2(m) of the Factories Act, 1948 and as a result would not be an industrial establishment for the purposes of Chapter VB of the Industrial Disputes Act, 1947.

7. The second submission that has been urged is that the provisions of Section 25-F of the Industrial Disputes Act, 1947 are mandatory and that for want of compliance with the requirements contained in that provision the order of termination will have to be regarded as null and void. There can be no dispute with the principle of law that the requirements of Section 25-F are mandatory. However, in the present case, the termination of the services of the Appellant was in pursuance of a closure that was effected in pursuance of a notice issued under Section 25-FFA. Section 25-FFA applies inter alia to an undertaking wherein atleast

50 workmen are employed and it was in pursuance of the provisions of sub-section (1) that the employer furnished a notice to the appropriate government indicating the intention to close down the undertaking together with the reasons for the intended closure. Under Section 25-FFF where an undertaking is closed down for any reason whatsoever every workman who has been in continuous service for not less than one year in the undertaking immediately before the closure is entitled to notice and compensation in accordance with the provisions of Section 25-F "as if the workman has been retrenched". These provisions have been the subject matter of judicial pronouncement. In **M/s. Hathising Manufacturing Co. Ltd. v. Union of India**[1] a Constitution Bench of the Supreme Court noted the distinction in the terminology of Section 25-F on the one hand and Section 25-FFF on the other. The Constitution Bench noted that by Section 25-F there is a prohibition against retrenchment until the conditions prescribed therein are fulfilled. On the other hand under Section 25-FFF the closure is not made effective only upon the payment of compensation and upon the service of notice or wages in lieu thereof. By using the words "as if the workman had been

1 AIR 1960 SC 923.

retrenched" the Parliament has not placed the closure of an undertaking on the same footing as a retrenchment under Section 25-F. The Constitution Bench observed as follows :

> "By the plain intendment of S. 25 FFF(1), the right to notice and compensation for termination of employment flows from closure of the undertaking; the clause does not seek to make closure effective upon payment of compensation and upon service of notice or payment of wages in lieu of notice. An employer proposing to close his undertaking may serve notice of termination of employment and if he fails to do so, he becomes liable to pay wages for the period of notice. On closure of an undertaking, the workmen are undoubtedly entitled to notice and compensation in accordance with S. 25F as if they had been retrenched, i.e. the workmen are entitled beside compensation to a month's notice or wages in lieu of such notice, but by the use of the words "as if the workman had been retrenched" the legislature has not sought to place closure of an undertaking on the same footing as retrenchment under S. 25F. By S. 25F, a prohibition against retrenchment until the conditions prescribed by that section are fulfilled is imposed; by S. 25FFF(1), termination of employment on closure of the undertaking without payment of compensation and without either serving notice or paying wages in lieu of notice, is, not prohibited. Payment of compensation and payment of wages for the period of notice are not therefore conditions precedent to closure."

8. The principle laid down by the Constitution Bench has been followed in several cases thereafter, among them being **M/s. Avon Services Production Agencies (P) Ltd. v. Industrial Tribunal**[2] (at paragraph 16 page 11) and more recently in **Maruti Udyog Ltd. v. Ram Lal**[3] (paragraph 33 page 651).

9. Consequently having regard to the settled position in law laid down by the Constitution Bench and followed thereafter, the requirement of paying compensation and of issuing a notice or wages in lieu thereof under sub section (1) of Section 25-FFF "as if the workman had been retrenched" cannot be placed on the same footing as the requirement under Section 25-F. The observance of the requirement under Section 25-F as if the workman was retrenched is not a condition precedent to a valid action of the closure of an establishment under Section 25-FFF. In the present case the letter of termination intimated to the workman that the compensation together with one month's salary in lieu of notice had been kept ready together with other legal dues. The witness who deposed on behalf of the management stated during the course of his deposition that the legal dues were collected by the workman

2 (1979) 1 SCC 1.
3 (2005) 2 SCC 638.

subsequently. In these circumstances, it cannot be said that there was any breach of the requirements of Section 25-FFA and and Section 25-FFF of the Industrial Disputes Act, 1947.

10. In the course of his cross examination, the workman admitted that each kitchen was called as a separate department and that each kitchen is known as a department. The workman admitted that the South Indian kitchen was closed since 16th November, 1991 and that his services had been terminated by a letter of the same date on the ground that the South Indian kitchen was closed.

11. The third submission is that there is an unfair labour practice with reference to the provisions of items 4(a) and 4(f) of Schedule II to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. Under item 4 the unfair labour practice consists of encouraging or discouraging membership of any union by discriminating against any employee. Clause (a) deals with discharging or punishing an employee because he urged other employees to join or organise a union. Under clause (f) the unfair labour practice is of discharging office-

bearers or active union members, on account of their union activities. The Industrial Court noted in the course of its discussion that the complainant had not produced any document to show that he was an office-bearer of the union or that his services were terminated because of such membership. In the circumstances, an unfair labour practice under item 4(f) was held not to have been proved. The conclusion of the Industrial Court that unfair labour practices have been established under item 4(a) was solely on the ground that the management had not complied with the legal provisions before closure was effected. This finding is patently erroneous for more than one reason. For one thing, it has correctly been observed by the Learned Single Judge that the provisions of Chapter VB of the Industrial Disputes Act, 1947 were not attracted. We have also come to the conclusion that the Industrial Court was in error in holding that the termination was invalid for non compliance of the provisions of Section 25F of the Act. That apart, once it has been found that the complainant had not produced any documentary evidence in support of the union membership, the plea that there was a discrimination on that ground against the workman must fail. There was absolutely no material before the the Industrial Court to come to the conclusion that an unfair labour

practice under item 4(a) was established.

12. For all these reasons, we do not consider that any case has been made out for interference in the exercise of the appellate jurisdiction. The Appeal shall accordingly stand dismissed. In the circumstances, there shall be no order as to costs.

(R. M. S. KHANDEPARKAR, J.)

(DR. D.Y. CHANDRACHUD, J.)